CO/2984/2015

Neutral Citation Number: [2015] EWHC 3541 (Admin)
IN THE HIGH COURT OF JUSTICE
QUEEN'S BENCH DIVISION
THE ADMINISTRATIVE COURT

Royal Courts of Justice
Strand
London WC2A 2LL

Monday, 12th October 2015

B e f o r e:

MR JUSTICE HOLGATE

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Between:
CLAIRE ENGBERS

Claimant

v

SECRETARY OF STATE FOR COMMUNITIES AND LOCAL GOVERNMENT

Defendant

and

SOUTH OXFORDSHIRE DISTRICT COUNCIL

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Mr C Lockhart-Mummery QC & Mr A Mills (For Judgment Only) (instructed by Harvey Jaskel Solicitors) appeared on behalf of the **Claimant**

Mr R Kimblin (instructed by Treasury Solicitor) appeared on behalf of the **Defendant**

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J U D G M E N T

MR JUSTICE HOLGATE:

Introduction

1. The claimant, Claire Engbers, applies under section 288 of the Town and Country Planning Act 1990 to quash the decision of the Secretary of State for Communities and Local Government given by his Inspector in a letter dated 20th May 2015. The Inspector dismissed the claimant's appeal against the decision of the second defendant, the South Oxfordshire District Council, to refuse outline planning permission for up to 110 dwellings at Thames Farm, Reading Road, Shiplake, Henley-on-Thames. All detailed matters were reserved for future consideration apart from the means of access to the site.

The Inspector's Decision Letter

2. The appeal site is around 5.65 hectares in area. Its eastern boundary fronts on to the A4155 Reading Road. It was proposed that vehicular access to the site would be located at a point lying approximately in the middle of that frontage. In paragraph 7 of his decision the Inspector set out what he considered to be main issue in the appeal:

> "I consider that the main issue in this case is whether the proposal would amount to sustainable development, with particular reference to: housing land supply; the effect on the safety and convenience of highway users; the effect on the character and appearance of the area; the effect on housing supply, with reference to Affordable Housing and housing mix; the effect on biodiversity; the effect on public water supply; whether the scheme would make adequate provision for infrastructure and facilities necessary to support the development; and, the degree to which facilities and services would be accessible from the site by sustainable modes of transport."

3. In paragraph 27 of his Decision Letter (I shall use the convention of DL27 from here on) the Inspector stated that the scheme proposed two pedestrian routes between the appeal site and Lower Shiplake village centre in order to gain access to the local station, shops

and other services. This claim concerns the way in which the Inspector dealt with the second route known as route A. He recorded in DL 28 that at the inquiry the appellant confirmed that route A is the main intended pedestrian route between the site and Lower Shiplake.

4. The A4155 follows a straight alignment alongside the eastern boundary of the appeal site and runs for a further 190 metres or thereabouts beyond the southern boundary of the site. It then bends to the west at the Shiplake War Memorial Island which is located at the junction with Station Road.

5. Route A involved the creation of a pedestrian access at the south eastern corner of the appeal site and also a new 2 metre wide footpath in the western verge of the A4115 between that corner and the War Memorial Island. The developer would also provide crossings from the new footpath to the island site and thence to Station Road, using dropped curbs. The relevant lengths of the A14455 and Station Road are subject to a 30 mile per hour speed limit.

6. In DL26 the Inspector said:
   "Neither the Council nor the Highway Authority object to the scheme on the basis of its effect on the safety and convenience of highway users. Nonetheless, I have had regard to the concerns raised by other interested parties, including Shiplake Parish Council."

7. He set out his assessment of the route A proposal between DL29 and DL34:
   "29. At the request of the Highway Authority, route A has been the subject of a Stage 1 Road Safety Audit (RSA). The RSA identifies that 'although the A4155 is subject to a 30 mph speed limit in this location, it is semi-rural and has a straight alignment on the southern approach to the junction with Station Road. If drivers travel at speeds greater than 30 mph, there may be insufficient stopping sight distance (SSD) in the event that a pedestrian steps out to cross the road from the inside of the bend at the proposed pedestrian crossing. There is a risk, therefore, that pedestrians may be struck by passing vehicles with resultant serious injury. Checks should be made to ensure the 43 metre visibility envelope shown on the application plans is adequate for

vehicle approach speeds.'

30. The Designer's Response to Stage 1 Road Safety Audit suggests that the proposed visibility envelope 'has been shown for the posted speed limit of the road and the proposed pedestrian crossing is well within the 30 mph speed limit zone and at a sharp-bend in the road alignment, therefore vehicle speeds should be at or below the posted 30 mph speed limit.' However, based on what I have read, heard and seen, I consider that little reliance can be placed on this view. Records of speed surveys undertaken along the 30 mph section of Reading Road in the vicinity of the appeal site show 85th percentile speeds significantly in excess of the 30 mph speed limit. Whilst the appellant has indicated that the proposed highway works in the vicinity of the appeal site entrance would be likely to have a traffic calming effect, there is no evidence before me to show that this would be likely to significantly depress traffic speeds approaching the proposed crossing point at the war memorial island, which is some distance away. I have had regard to the guidance set out in Manual for Streets to the effect that reduced forward visibility tends to reduce average speeds. Nonetheless, based on my own observations, both as a driver and pedestrian travelling along Reading Road, I saw little evidence that the bends in the road in the vicinity of the proposed crossing point caused traffic to slow to any significant degree.

31. With reference to the speed survey results, the appellant indicated at the Inquiry that vehicles may require SSDs of up to around 63 metres northbound and 87 metres southbound. I have not been provided with any compelling evidence to show that this could be achieved in the vicinity of the proposed crossing at the war memorial and consider it unlikely on the basis of my own observations.

32. Whilst the Highways and Transport Statement of Common Ground (SoCGH) indicates that the detailed design process may reveal a more suitable point at which to cross Reading Road, no details of likely alternatives have been provided to me. Given the winding nature of the highway hereabouts, which restricts intervisibility between drivers and pedestrians crossing the road, I am not convinced that a suitable alternative could be found. I give the unsupported assertion contained within the SoCGH little weight.

33. The TA indicates that over 50 pedestrians are likely to travel to, and a similar number away from, the site each day. I saw that in the morning and early evening, when pedestrians would be most likely in my view to want to travel between the appeal site and facilities within Lower Shiplake, such as the train station and school bus pick-up points, traffic conditions along the A4155 were busy. I have no reason to believe that these conditions were unusual. Due to the limited intervisibility between pedestrians starting to cross the highway in the vicinity of the war memorial and drivers

approaching along the A4155, I consider that there would be a significant risk of pedestrians crossing when approaching drivers have insufficient time to react to avoid a collision. Furthermore, drivers who are able to stop in time to avoid a pedestrian part way across the highway would themselves potentially interrupt the free flow of traffic. In my judgement, the use of the proposed crossing would be likely to pose a serious threat to the safety and convenience of highway users.

34. I conclude that the proposal would be likely to have a severe adverse residual cumulative effect on the safety and convenience of highway users. In this respect it would conflict with the aims of Policy T1 of the South Oxfordshire Local Plan 2011 (LP), which are consistent with the Framework insofar as it seeks to ensure that safe and suitable access to the site is provided and that conflicts between traffic and pedestrians are minimised. This harm weighs heavily against the grant of planning permission in this case."

8. In summary the Inspector's reasoning on this issue proceeded as follows:-

(i) The independent safety audit of route A commissioned by the applicant raised the issue of whether the visibility envelope of 43 metres in each direction on the inside of the bend of the A4155 provided a sufficient stopping site distance in the event that a pedestrian steps out to cross the road from that side of the bend at the proposed crossing. The audit indicated that speeds of vehicles approaching the bend should be checked (see DL29):

(ii) The Inspector considered that little reliance should be placed upon the 'designer's response', that vehicles speeds should be below 30 mph at this particular location because speed surveys alongside the appeal site show 85th percentile speeds significantly in excess of 30 mph, the highway works proposed for the entrance to that site would not significantly depress the speed of traffic approaching the crossing point to the south, and from the Inspector's own observations there was 'little evidence that the bends in the vicinity of the proposed crossing point caused traffic to slow to any significant degree'. (see DL30);

(iii) The speed survey results indicated that stopping site distances of around 63 metres northbound and 87 metres south bound may be required, no compelling evidence had been produced to show that these could be achieved with the vicinity of the proposed crossing and from his own observations the Inspector considered that to be unlikely (see DL31);

(iv) Although the statement of common ground for the inquiry agreed in July 2014 between the applicant's consultant engineer (Mr Bret Farmery of Cole Easdon Consultants Ltd) and the Highway

Authority (Oxfordshire County Council) indicated that other suitable alternatives could be found, no details have been given and the Inspector doubted whether such an alternative could be found given the winding nature of the highway (see DL32);

(v) The A4155 is busy at the times when most pedestrians would want use to the crossing and because of limited intervisibility between pedestrians using the crossing and drivers approaching on the A4155 there would be a significant risk of those drivers being unable to avoid a collision. Alternatively, drivers stopping in time could interrupt the free flow of traffic. The Inspector concluded that this represented a serious threat to the safety and convenience of highway users and amounted to harm weighing "heavily against the grant of planning permission" (see DL33 and 34).

9. It is common ground that that last conclusion was a decisive factor in the Inspector's decision to dismiss the appeal. Despite a number of points telling in favour of the proposal, in his concluding section the Inspector stated (DL83):

"Nonetheless, the scheme would have a severe adverse residual cumulative effect on the safety and convenience of highway users. I attach great weight to this harm, which weighs very heavily against the scheme. Furthermore, it would have an adverse effect on the character and appearance of the area, which also weighs significantly against it."

10. These adverse affects were reflected in DL87 where the Inspector stated:

"Having had regard to the social, environmental and economic impacts of the scheme, I consider on balance that the benefits of the proposal would be significantly and demonstrably outweighed by its adverse impacts. Whilst I have had regard to the conditions suggested, in my judgement, it would not be possible through the imposition of reasonable conditions to mitigate the harm that I have identified sufficiently to make the development acceptable in planning terms. I conclude overall, with reference to the Framework, that the scheme would not amount to sustainable development."

Grounds of Challenge

11. Mr Christopher Lockhart-Mummery QC, on behalf of the claimant, seeks to advance legal challenges to the Inspector's conclusions on the acceptability of the route A

pedestrian link to the village centre. It is not disputed that if he succeeds in doing so the decision should be quashed. It is not argued by Mr Richard Kimblin, on behalf of the Secretary of State, that the Inspector identified any other freestanding objection to the proposal sufficient to outweigh its benefits and justify the dismissal of the appeal, applying the test in Simplex GE Holdings Ltd v Secretary of State for the Environment (1989) 57 P&CR 306.

12. The claimant raises two grounds of challenge:-
    (i) the dismissal of the appeal on the grounds of inadequate visibility at the proposed pedestrian crossing point at the war memorial site was procedurally unfair.
    (ii) the Inspector failed to consider the imposition of a 'Grampian condition' preventing the development from taking place unless and until the local planning authority approved a pedestrian link to the village centre and thereby acted unfairly. Alternatively his failure to raise the merits of imposing a Grampian condition with the parties was procedurally unfair.

13. In response, Mr Kimblin submitted that by virtue of statements made by the Inspector during the appeal process combined with representations from members of the public, the visibility issue had been sufficiently raised as a matter for the claimant to deal with and therefore the Inspector had not been obliged to give the claimant an opportunity to deal with the matters appearing in DL29 to 34.

14. On the second ground Mr Kimblin submitted that the Inspector had applied national policy on the appropriateness of imposing a Grampian condition by concluding that he was not "convinced that a suitable alternative could be found" and that he had been entitled to reach that conclusion on the evidence put before him. It was submitted that no procedural unfairness had taken place in relation to this second issue.

15. In order to put matters into context I should record at this stage that:-

    (i) It was expressly agreed between the claimant and the local planning

and highway authorities that there were no highway or safety objections to the appeal proposal including the proposed pedestrian route A.

(ii) despite an initial suggestion on behalf of the Secretary of State that the Inspector's statements at the inquiry had sufficed by themselves to alert the claimant to deal with the visibility issue, Mr Kimblin subsequently accepted that in isolation they were insufficient for this purpose in this particular case and that the defendant's resistance of ground 1 depended also upon certain representations made by members of the public.

Ground 1:

Relevant Legal Principles

16. The parties agree that the leading authority on procedural unfairness for the purposes of this challenge is the decision of the Court of Appeal in Hopkins Development Ltd v Secretary of State for Communities and Local Government [2014] PTSR 1145. In that case a planning Inspector had dismissed an appeal for 58 dwellings because the adverse impacts of the proposal, which were said to include its effect on the character and appearance of the area and the location's lack of sustainability, outweighed the contribution that it would make towards meeting a substantial shortfall in the 5 year housing land supply and other benefits.

17. The Claimant in Hopkins persuaded the High Court to quash the decision on the grounds of procedural unfairness because the Inspector had failed to warn the appellant that its appeal might be dismissed on character and appearance and sustainability grounds. The Court of Appeal reversed that decision. The developer had chosen not to dealing with those issues at the appeal because they maintained that they had not been raised in the Inspector's statement entitled "Notes on inquiry procedure" under rule 7(1) of the Town and Country Planning Appeals (Determination by Inspectors) (Enquiries Procedure

(England) Rules 2000 ("rule 7 statement"), nor in the statement of common ground agreed with the local planning authority under rule 12, nor specifically in the statement of "main issues" under rule 16 at the start of the inquiry.

18. The developer in Hopkins adopted that stance albeit that (a) in its opening statement and subsequent evidence the local planning authority made it plain that it was relying upon the sustainability issue as one reason for seeking the dismissal of the appeal and (b) third parties raised objections at the inquiry to the effect of the proposal on the character and appearance of the area.

19. In paragraph 47 of his judgment Jackson LJ stated that there are two principles of natural justice or procedural fairness which are in play in an appeal of this nature. Any participant in adversarial proceedings is entitled firstly to know the case which he has to meet and secondly, to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case. The first principle raises the question whether an issue has been raised so that a party is sufficiently aware that it is a matter for him to address.

20. Having reviewed a number of authorities in the High Court Jackson LJ set out a number of principles to be applied when considering the procedural fairness in the context of a planning inquiry:-

> "62. From reviewing the authorities I derive the following principles:
>
> (1) (i) Any party to a planning inquiry is entitled to know the case which he has to meet and (ii) to have a reasonable opportunity to adduce evidence and make submissions in relation to that opposing case.
>
> (2) If there is procedural unfairness which materially prejudices a party to a planning inquiry that may be a good ground for quashing the Inspector's decision.
>
> (3) The 2000 Rules are designed to assist in achieving objective 1(i), avoiding pitfall 1(ii) and promoting efficiency. Nevertheless the Rules are not a complete code for achieving procedural fairness.
>
> (4) A rule 7 statement or a rule 16 statement identifies what the

Inspector regards as the main issues at the time of his statement. Such a statement is likely to assist the parties, but it does not bind the Inspector to disregard evidence on other issues. Nor does it oblige him to give the parties regular updates about his thinking as the Inquiry proceeds.

(5) The Inspector will consider any significant issues raised by third parties, even if those issues are not in dispute between the main parties. The main parties should therefore deal with any such issues, unless and until the Inspector expressly states that they need not do so.

(6) If a main party resiles from a matter agreed in the statement of common ground prepared pursuant to rule 15, the Inspector must give the other party a reasonable opportunity to deal with the new issue which has emerged."

21. For the purposes of this challenge it is also relevant to refer to two decisions of the High Court which were cited by Jackson LJ with either express or implicit approval. In Castleford Homes Ltd v Secretary of State Environment Transport and the Regions [2001] EWHC (Admin) 77; [2001] PLCR 470, Ouseley J held that an Inspector need not provide a party with an opportunity to deal with an issue where that party "ought reasonably to have been aware on the material and arguments presented at the inquiry that a particular point could not be ignored or that a particular aspect needed to be addressed". In that case the decision was quashed because the Inspector departed from what appeared to be the common position of the appellant and the local planning authority without raising the matter explicitly at the inquiry.

22. In R (Poole) v Secretary of State for Communities and Local Government [2008] JPL 1774, the local planning authority and the appellant had agreed in a statement of common ground that trees protected by a tree preservation order could be maintained within a development scheme, alternatively, that the loss of any protected tree could be mitigated by a condition requiring replacement. It was held that the Inspector had acted unfairly by denying the appellant an adjournment to enable him to call evidence made necessary by

the local planning authority resiling from the statement of common ground at the inquiry.

23. In Poole there was no difficulty in Mr Poole being able to identify the issue which needed to be addressed because of the manner in which the local authority had resiled from the statement of common ground. The problem instead was that he was denied an opportunity to deal with it. At paragraph 58 of his judgment Jackson LJ endorsed "valuable guidance" given by Sullivan J (as he then was) that when deciding whether a party could reasonably have anticipated that an issue had to be addressed, it is important to bear in mind the highly focused nature of a modern public inquiry where the whole emphasis of the procedural rules and guidance is to encourage parties to focus their evidence and submissions on those matters that are in dispute. In addition, when deciding whether there has been procedural unfairness the court should take into account the importance of the issue in respect of which the Inspector differed from a position agreed in a statement of common ground. In Poole the issue proved to be determinative in the decision letter.

24. Beatson LJ and Christopher Clarke LJ agreed with the judgment of Jackson LJ. Beatson LJ (with whom Christopher Clarke LJ also agreed) added that:

> "It is a commonplace that the determination of the requirements of procedural fairness is 'acutely sensitive to context and the particular factual situation.'"(see paragraph 85).

He pointed out that in the Hopkins case the developer had chosen not to challenge the evidence and submissions on what were "live issues" at the inquiry or matters which had "clearly emerged as significant issues as a result of the evidence of the third parties at the inquiry" (paras 93 and 97).

25. Mr Kimblin accepted, on behalf of the Secretary of State, the well-known principle that,

although an Inspector is not bound by an agreement reached by an appellant and the local planning authority in a statement of common ground, if the Inspector is going to depart from that agreement in the reasons given for deciding the appeal, then in general the Inspector should give the participants at the inquiry an opportunity to deal with the issue he or she has in mind in order for the procedure to be fair (for a recent example of this principle see Gates Hydraulics Ltd v Secretary of State for Communities and Local Government [2009] EWHC 2187 (Admin)). It follows that in a case where the local planning authority does not resile from the statement of common ground agreed with the appellant and the Inspector does not reveal at the inquiry his or her disagreement with a matter contained in that statement and that disagreement influences the outcome of the appeal, the court may be unable to uphold the decision unless it can be shown that the appellant ought reasonably to have been aware of that issue and its potential significance for the decision from another source, for example third party representations.

The Evidence

26. In addition to the Decision Letter itself it is necessary to consider the statements filed on behalf of the claimant from two witnesses, Mr Les Durrant and Mr Brett Farmery, who gave expert evidence at the inquiry on planning and highway matters respectively. Although these statements were signed in June 2015 and served at that stage it was not until 17th September that a witness statement from the Inspector, Mr Ian Jenkins, was supplied to the claimant's solicitors followed by a bundle of over 500 pages. The Inspector does not dispute any of the content of the witness statements of Mr Durrant and Mr Farmery. The main purpose of the Inspector's statement was to exhibit copies of his rule 7 statement and the large number of written representations from third parties

covering a wide range of topics. Despite the size of the bundle the Secretary of State relied upon only a small number of passages from these representations.

27. The District Council refused planning permission on seven grounds. The Decision Letter confirms that the inquiry was taken up with a broad range of issues. The Council's second ground of refusal raised a highway objection but this was limited to a lack of information on two very detailed design issues concerning refuse vehicles and an emergency access. By the time of the inquiry this issue was resolved.

28. In the statement of common ground on planning matters agreed with the District Council in March 2014, paragraph 8.3 recorded the agreement that "safe access can be provided into Shiplake for pedestrians with a new footpath along Reading Road".

29. The subject was dealt with in more detail in the statement of common ground agreed between the claimant and the highway authority in July 2014. Paragraph 1.4 of that statement read:

> "The information contained within this SoCG is considered by both Cole Easdon Consultants Limited (CEC) and OCC to fully address and therefore overcome refusal reason 2, whilst also addressing other matters raised in the LHA's consultation response. As such, there are not highway related matters which remain unresolved."

30. At the end of paragraph 4.1 of the statement it was agreed that:

> "'Access point 4' connects to Reading Road (A4155) at the south-eastern corner of the site and it is agreed that it will provide access for pedestrians wishing to walk along the proposed footway (on the west side of Reading Road) towards Lower Shiplake village centre."

Paragraph 4.3 stated:

> "Whilst it is agreed that the site access arrangement, abovementioned access points and proposed footway along Reading Road will all be subject to detailed design, the remainder of this Section outlines the design principles that have been agreed."

I pause there to note that the clear inference was that it was agreed that the matter of the pedestrian access via route A could be dealt with by condition attached to the grant of a permission.

31. Paragraph 4.8 of the statement of common ground dealt with access point 4 in the following terms:

> "Access Point 4 will lead from the south eastern corner of the site where it will link with the proposed footway to be constructed in a southerly direction along the western side of Reading Road (A4155) (refer to Section 5.0 of the SoCG). A staggered barrier arrangement is proposed immediately before the footpath reaches the western side of the A4155 carriageway. This detail is agreed, and is shown on CEC Plan 3537/201 Revision H [Proposed Site Access Ghost Island Right Turn Lane] in Appendix 1. This footway will also be 2m wide."

32. Paragraph 5.5 and 5.6 dealt with the proposed new footway alongside Reading Road in the following terms:

> "5.5 With regard to the new footway along the west side of Reading Road (A4155), from the south east corner of the proposed development site to the junction of Reading Road (A4155) with Station Road, it is agreed that this will be implemented by the developer via a Section 278 Legal Agreement.
>
> 5.6 CEC Plan 3537/202 Revision A [Proposed Footway Route to Local Facilities] in Appendix 1 shows the proposed footway and is agreed. The proposed footway will be subject to detailed design, on a topographical survey base, where that detailed design will need to be submitted to and approved by the local highway authority prior to implementation. Refer to Section 6.0 for further detail."

33. Once again it is apparent that the parties envisaged that the detailed design of this footpath link would be controlled appropriately by a condition attached to a planning permission. Paragraph 5.9 of the statement reads:

> "Further to OCC's consideration of the two documents described in paragraph 5.7 (via Revision A of this SoCG) it is agreed that:
> • with regard to Auditors' Safety Concern Reference 3.1, whilst the footway

route is agreed in principle, the detailed design process may reveal a more suitable point (with respect to available visibility splays) at which to cross Reading Road (A4155) than that presently shown CEC Plan 3537/2012 Revision A; and
• with regard to Auditors' Safety Concern Reference 4.1, the footway implementation will be subject to detailed design which may include the provision of street lighting."

I will return to the safety audit shortly.

34. Paragraph 7.6 of the statement dealt with the statement of draft conditions. The Highway Authority and the claimant proposed that a condition should be imposed requiring development to be carried out in accordance with drawings which included the proposed footway route A. Draft condition 5 read as follows:

"Footway Prior to Occupation.
Prior to the first occupation of the development hereby permitted, the footway alongside the Reading Road (A4155) and crossing point as illustrated in principle on Drawing 3537/202 Revision A, shall be laid out, constructed and completed in accordance with specification to be submitted to and approved in writing by the Local Planning Authority."

35. From these passages it is clear that the highway authority and the local planning authority were content with the principle of the crossing proposed at the War Memorial Island site but wished to control the detailed design or specification of the link having regard to, amongst other things, matters raised in the safety audit.

36. Mr Lockhart-Mummery commented that draft condition 5, a type of Grampian condition, would have needed to be tightened up. Although there was no need for the link to be provided before the first occupation of any dwelling, he said that the condition ought additionally to have required that the detailed design be approved by the local planning authority in consultation with the Highway Authority before the commencement of any development. He submits, and I agree, that ordinarily that would have been addressed in

a discussion led by the inspector in the "conditions session" of the inquiry.

37. I return to the safety audit. Paragraph 5.8 of the statement of common ground states:

> "The Stage 1 road Safety Audit is contained in Appendix 3. The findings of the Road Safety Audit are self-explanatory. Also provided within Appendix 3 is the Designer's Response to the Road Safety Audit, where the former document *addresses the minor points raised by the auditors* (emphasis added)."

38. The independent safety audit had been carried out on 2nd April 2014. The key passages of the audit read as follows:

> "Although the A4155 is subject to a 30mph speed limit in this location, it is semi-rural and has a straight alignment on the southern approach to the junction with Station Road. If drivers travel at speeds greater than 30mph there may not be sufficient stopping sight distance in the event that a pedestrian steps out to cross the road from the inside of the bend at the proposed pedestrian crossing location. There is a risk, therefore, that pedestrians may be struck by passing vehicles with resultant serious injury."

Then paragraph 3.1.1:

> "Recommendation.
> Checks should be made to ensure the 43m visibility envelope shown on CEC Plan 3537.202(A) [Proposed Footway Route to Local Services], enclosed within Appendix 1, at the proposed pedestrian crossing point is adequate for the vehicle approach speeds along the A14155."

Paragraph 3.2:

> "Safety Concern
> The 43m visibility envelope shown on CEC Plan 3537/202(A) [Proposed Footway Route to Local Services], enclosed within Appendix 1, for the proposed pedestrian crossing location will require the trimming and/or removal of the hedgerow/vegetation on the inside of the bend at the junction between A4155 and Station Road. The visibility envelope will not otherwise be achievable with the resultant significant risk that pedestrians may be struck by passing vehicles."

And then paragraph 3.2.1:

> "Recommendation
> Ensure that the trimming/removal of the hedgerow is deliverable and that

there are no other obstructions within the visibility envelope. The visibility envelope should be kept clear thereafter."

39. The safety audit recommended that traffic speeds in the vicinity of the crossing should be checked to see whether the visibility envelope or splay of 43 metres in each direction needed to be adjusted and also whether the obstruction of the required splay by vegetation could be avoided.

40. The claimant's designers responded to the safety audit in a separate document also produced in April 2004. Paragraph 2.1.2 read as follows:

"Designers Response
Visibility has been shown for the posted speed limit of the road and the proposed pedestrian crossing is well within the 30mph speed limit zone and at a sharp s-bend in the road alignment, therefore vehicle speeds should be at or below the posted 30mph speed limit. However, should the local highway authority require, further speed tests could be carried out to obtain actual vehicle speeds and the pedestrian visibility splays adjusted accordingly."

Then paragraph 2.2.2:

"Designers Response.
Extent of Public Highway data has been obtained from Oxfordshire County Council (OCC). This has confirmed that the visibility envelope shown on drawing no. 3537/201 Rev A is achievable within public highway. A copy of this plan is contained in appendix 1."

41. It is important to note that although in DL29 the Inspector quoted the whole of paragraphs 3.1 and 3.1.1 of the safety audit, including the recommendation to check the speeds of vehicles approaching the crossing, and the size of the visibility envelope required for those speeds, he omitted the last sentence of paragraph 2.1.2 of the designer's response in which the claimant offered to carry out speed tests if required by the highway authority and to adjust the visibility splay as might be necessary in the light of any such tests.

42. Mr Kimblin was unable to offer any justification or explanation for this omission.

Plainly the sentence omitted was significant, because not least in paragraph 5.8 of the statement of common ground and highway matters the Highway Authority agreed with the claimant that the designer's response document addressed "the minor points raised by the auditors".

43. I accept Mr Lockhart-Mummery's submission that as matters then stood the claimant and the two authorities approached the inquiry on the agreed basis that, if required, vehicle speeds could be checked and visibility splays adjusted as part of the detailed design process which would follow if the appeal were to be allowed and planning permission granted. Very properly Mr Kimblin did not contend otherwise.

The Inquiry

44. In paragraph 2.2 of his witness statement Mr Durrant says:-

> "Because the Statement of Common Ground (Highways) was prepared and agreed prior to the PLI opening by CEC between the Applicant and Oxfordshire County Council (OCC)(in their capacity as local highway authority), Brett Farmery was not initially required to be called as a witness to give evidence to the Inquiry, as neither OCC nor SODC called any evidence in respect of highway safety and access matters in the light of the agreed Statement of Common Ground (Highways). He did not, therefore, prepare a proof of evidence."

45. In relation to highway matters Mr Durrant also states:

> "3.1 Shiplake Parish Council (SPC) was represented at the PLI and evidence on their behalf was given by Mr Tudor Taylor, Chairman of SPC. Mr Taylor produced a statement which made reference to the A4155 Reading Road and the issue of road safety, access and pedestrian accessibility. Mr Taylor's statement did not contain any criticism of the available visibility at the proposed crossing point.
>
> 3.2 Mr David Cooper, advocate for the Applicant, offered for Brett Farmery to be called in order to deal with points arising during the PLI and to answer any specific question which the Inspector (a qualified Engineer) may wish to put to him, notwithstanding the fact that a Statement of Common Ground (Highways) was in place between the Appellant and the local highway

authority.

3.5 I have seen Brett Farmery's Witness Statement on this matter and concur with the statements made therein concerning the Inspector's questions. I confirm that I am also familiar with the two Technical Notes referred to by Brett Farmery, dated 15th December 2014 and the second document dated 17th December 2014.3.7 Tudor Taylor of SPC raised a question concerning lighting at the possible crossing point on Reading Road and Brett Farmery said that, in his opinion, this was a detailed matter which could be dealt with in due course. The Inspector invited Brett Farmery to express a view to which Brett Farmery replied that it may be appropriate to light the crossing but not the path. David Cooper did not conduct a re-examination."

46. On the evidence before the Court it is important to note that the Inspector did not raise any question during the inquiry taking issue with the agreed position in the statement of common ground that the detailed design of the crossing as regards visibility could be left to be dealt with under a condition.

47. Mr Brett Farmery is the managing director of Cole Easdon. In paragraph 2.2 of his witness statement he says:-

"On 9th December 2015, I was asked by the applicant to attend the Inquiry, in order to address specific queries that had been raised by the Inspector. These were, so far as now relevant, as follows:

• The Road Safety Audit (which is included as an Appendix to the SoCG) relating to the crossing point assumes speeds of 30mph. Have speed surveys been undertaken?
• Paragraph 5.9 of the SoCG states alternative crossing locations may be determined at the detailed design stage, what might these be?
• The Inspector requested more details on the visibility splays at the proposed site access (comparison of Design Manual for Roads & Bridges and Manual for Streets standards).
• Reading Road is not flat along the visibility splays at the site access. The Inspector queried whether vertical alignment had been accounted for."

48. The first and second bullet points related to the pedestrian crossing. The third and fourth bullet points related however to the acceptability of the main site assess located about 300

metres to the north of the pedestrian crossing which is not germane to this challenge. In his statement Mr Farmery also said:

> "2.3 These matters were addressed at the Inquiry on Friday 12th December, where specific interest was taken by the Inspector in the required visibility splays for the *site access proposal*, and the two sets of speed survey results available (by CEC and OCC respectively). None of my responses were queried, and I was not cross-examined. I also addressed questions from third parties. I produced the Technical Note dated 15th December 2014 (attached hereto as BF2) further to the Inspector's request that day, and issued this to him on 16th December 2014. Part of the Technical Note related to visibility splay (Stopping Sight Distance or SSD) calculations for the *site access proposal*. Within the Technical Note, I advocated that the CEC surveys were more relevant to *the site access design* than the OCC survey.
>
> 2.4 I subsequently attended the Inquiry again on 17th December to answer specific queries from the Inspector about the aforementioned Technical Note. At the Inspector's request, I then prepared a subsequent Technical Note dated 17th December (attached hereto as BF3). This second Technical Note provided additional calculations based on the OCC survey results, but again, solely in relation to *the site access design* (as confirmed by the title block information in the appendices to that document).
>
> 2.6 The visibility splay calculations presented in the two aforementioned Technical Notes were undertaken with regard to *the site access design*.
>
> 2.8 At no point was any concern raised by the Inspector regarding the available visibility splays a *the proposed crossing location*.
>
> 3.3. At no point during the Inquiry (and the associated accompanied site visit) were concerns raised by the Inspector about visibility splays at *the proposed crossing location*. Further to my statement in paragraph 2.7 above, had such concerns been raised, I would have suggested that localised speed surveys be undertaken. CEC have their own (independently calibrated) radar gun, and could have obtained an indication of vehicle speeds approaching the crossing in one morning or afternoon during the Inquiry period (or the lengthy adjournment period). Alternatively, a suitably worded condition could readily have been imposed, requiring details of the crossing point to be submitted and approved by the local highway authority prior to commencement of development (i.e., if a satisfactorily designed and located crossing point could not be agreed, the development could not proceed)." (emphasis added)

49. These paragraphs have not been challenged in the Inspector's witness statement. Mr Kimblin accepted that on the evidence before the court it would be proper to draw the

following two inferences:-

(i) the Inspector did not in fact raise either of the first two questions indicated on 9th December 2014 (the first day of the inquiry) in relation to the pedestrian crossing with the highway experts of the claimant or the highway authority when they came to give evidence:

(ii) no other party raised these matters with either of those experts during the inquiry.

50. From what I have set out above it is plain that if the Inspector was going to depart from the matters agreed in the statement of common ground on the pedestrian crossing logically he would need to address all three of the following matters:-

(i) what are the measured speeds in the vicinity of the pedestrian crossing?

(ii) according to technical guidance what visual envelope would be required for those measured speeds?

(iii) is there sufficient highway land or control over other land to enable that envelope to be provided either in the proposed location or pursuant to a condition in an alternative location.

51. I emphasise the use of measured speeds because that formed part of the basis upon it was agreed in the statement of common ground that the adequacy of the design could be tested and adjusted if necessary. Having measured those speeds it would then be necessary to ascertain objectively the required visibility envelope for those specific parameters.

52. Finally, and in any event, given that it was agreed in the statement of common ground

that matters of this kind could be controlled by an appropriately worded condition, it would not have been sufficient for the Inspector to address the first two matters, speeds and visibility splays, without also raising with the parties at the inquiry, the extent of the highway land and the appropriateness of control by condition. It is common ground that none of these matters were raised by the Inspector during the inquiry itself and it is not suggested that any other party did.

53. The technical notes dated 15th and 17th December provided by Mr Farmery in response to questions from the Inspector went into some detail on the speed surveys and stopping distances relevant to the acceptability of the design of the main vehicular site access on the eastern boundary of the appeal site. Thus, it is all the more surprising that issues of that nature in relation to the pedestrian crossing were not pursued by the Inspector during the inquiry itself, especially if they were going to be important to the outcome.

54. On 17th December 2014 closing submissions were presented to the Inspector. The formal closure of the inquiry was deferred to March 2015 to enable other issues relating to a section 106 obligation to be addressed. Those issues are not relevant to the present challenge but there was a substantial period during which the Inspector could have raised with the parties the concerns he had in relation to the pedestrian crossing. The site visit took place on 18th December 2014. It is well understood, and often explained by Inspectors at inquiries, that no further oral evidence can be given at a site inspection. That inspection is for the examination of matters which have already been described and discussed at the inquiry or in written representations. The inspection does not provide an opportunity to raise issues which have not been raised in earlier representations or at the inquiry itself.

55. In relation to the site inspection paragraph 2.5 of Mr Farmery's witness statement says as

follows:-

> "I was present at the attended site visit on 18 December and the subsequent continuation of the Inquiry that afternoon. During the site visit, I assisted the Inspector in measuring visibility splays at the proposed site access and proposed crossing point using a trundle wheel (measuring wheel). I also identified a possible alternative crossing point to the Inspector, who viewed the available visibility splays from either side of Reading Road at the alternative location, albeit he did not request they be measured using the trundle wheel."

56. In DL30 the Inspector expressed his own subjective judgment as to whether speeds in the vicinity of the crossing were likely to be significantly lower than along the straight section of Reading Road. But he did not address the agreed position that this was a matter which it was appropriate to measure rather than judge, if the proposed design were to be adjusted. In DL31 the Inspector applied the site stopping distances which had been judged appropriate for the site access and assumed that those distances should be provided at the location of the pedestrian crossing.

57. These matters were not raised at the inquiry. In relation to these aspects Mr Farmery says in his witness statement:-

> "2.7 At no point did the Inspector ask whether the available speed surveys (from CEC or OCC) were relevant to the crossing design (where actual speeds ar used to establish the required pedestrian-driver visibility splays.) If such a question had been posed, I would have stated that new speed surveys either side of the proposed crossing would be required. I would have stated that, with respect to the closest available survey (being the OCC survey) the northbound speeds would definitely not be suitable, as they relate to a point to the north of the crossing (on a straight section of Reading Road) rather than to the south of it, ie in the vicinity of the proposed crossing point (in the middle of an 'S' bend with speed activated 30mph limit signage etc.)...
>
> 3.4 Within paragraph 31 of the decision letter, the Inspector states that vehicles 'may require SSDs of up to around 63 metres northbound and 87 metres southbound'. These figures are taken directly from paragraph 2.2 of the Technical Note dated 17th December 2014 (see BF3) and relate to the OCC speed survey on the straight section of Reading Road to the north of the proposed crossing. As stated in paragraph 2.7 above, these speed survey

results are not suitable for calculating visibility splays (SSDs) relevant to the crossing design."

58. In DL32 the Inspector purported to deal with the third issue, namely the sufficiency of highway land and control to enable a visibility envelope to be provided. There the Inspector appears to criticise the statement of common ground for failing to provide details of alternatives of a more suitable crossing point. That overlooks the simple point that that statement was treating alternatives as a matter which could be left to detailed assessment and design following the grant of planning permission.
59. Based upon his own generalised remarks as to the winding nature of the highway restricting intervisibility between drivers and pedestrians crossing the road, the Inspector merely stated that he was not convinced that a more suitable alternative could be found. For these reasons alone he decided that little weight should be given to an "unsupported assertion" in the statement of common ground.
60. These comments do not, in my judgment, do proper justice to the statement of common ground. That document represented a considered agreement between two sets of independent experts following their examination of the issues. There was no reason for an Inspector to think otherwise. Accordingly, if the Inspector thought that the statement was lacking in supporting detail such that he was minded to disagree with it the obvious and necessary course for him to take was to raise the issue at the inquiry. He did not do so.

The Secretary of State's Submissions

61. Mr Kimblin says that there are seven signals which taken in conjunction, and not singly, put the claimant on sufficient notice of the visibility issue and the need to address it in

relation to the reasoning which emerged in the Decision Letter, namely:

(i) Paragraph 3.1 of the Inspector's rule 7 statement.

(ii) The questions asked by the Inspector on Day 1 of the inquiry.

(iii) The issue raised by Mr and Mrs Fairthorne.

(iv) The fact that the claimant arranged to bring Mr Farmery to the inquiry to deal with highway issues.

(v) The interest shown by the Inspector at the site inspection in the proposed pedestrian crossing by measuring the splay proposed and looking at one alternative location.

(vi) and (vii) responses from third parties to the application and to the appeal.

62. Firstly, I take together items (i), (ii) and (iv). Paragraph 3.1 of the Inspector's rule 7(1) statement said as follows:

"3.1 Based on the evidence submitted to him in writing so far, the Inspector considers that the main issue the case is:

- Whether the proposal would amount to sustainable development, with particular reference to
  - The effect on the proposal on:
    - Housing supply, including housing land supply, housing mix and Affordable Housing;
    - The character and appearance of the area;
    - The safety and convenience of users of the highway and other public rights of way;
    - Biodiversity;
    - Public water supply
  - Prematurity

  and
  - Whether the proposal would make adequate provisions for infrastructure"

That was a merely generalised statement capable of covering any highway issue. It could not be taken by itself as indicating the possibility that the Inspector would contradict the position agreed between the claimant and the two local authorities on the pedestrian crossing.

63. The two questions raised by the Inspector on day 1 of the inquiry were never pursued by him whereas other questions were, particularly in relation to the site access. Consequently, it would have appeared to participants at the inquiry that those two initial questions were not being pursued by the Inspector. It is noteworthy that the Inspector has said nothing in his witness statement about this aspect. Likewise, the mere fact that Mr Farmery was brought to the inquiry adds nothing. He dealt with the questions which were in fact raised with him. He provided two technical documents at the Inspector's request to address more detailed questions posed by the Inspector to him directly when he attended the inquiry but none of these points involved any concerns about the pedestrian crossing.

64. Turning to (v), the site visit, it is not suggested in the evidence before the court that the Inspector sought to measure any visibility splays other than the ones proposed for the site access and the pedestrian crossing. I also note that the Decision Letter did not suggest that the 43 metre visibility envelope proposed for the pedestrian crossing was not achievable. Mr Farmery identified an alternative crossing point to the Inspector but the latter showed no interest in having available splays there measured. There was nothing to indicate from what took place on the site inspection a risk that the Inspector might disagree with the statement of common ground in this respect. Here I bear in mind also my earlier remarks about the true purpose and scope of a site visit, as opposed to the giving of evidence and raising of questions within the inquiry itself.

65. Point (iii) concerns issues raised by Mr and Mrs Fairthorne. From their written representation it is apparent that they raised only two points with regard to the pedestrian crossing. First, they argued that the crossing would be too close to an uncontrolled junction with conflict points, relying upon a technical guidance note. In his first technical note Mr Farmery explained that the point was misconceived and the proposal accorded with the relevant technical guidance. The Inspector did not suggest otherwise in his Decision Letter. Second, the Fairthornes claimed that the proposed 43 metre visibility envelope could not be achieved physically and that it would not reach Woodland Road. But it is important to note that the Inspector did not rely on either of these points in his Decision Letter. I also record that there is no dispute that the relevant drawing merely shows the position of the 43 metre splays. It does not indicate that that would be the maximum level of visibility achievable. That was not the purpose of the drawing.
66. The representations by the Fairthornes did not raise any issue of real significance to contradict the statement of common ground or to signal matters which ought to be pursued further.
67. So ultimately the response to this ground of challenge rests on other third party representations. Mr Kimblin helpfully grouped them under four headings:- speed of traffic, road layout and hazards, accident history and the experience of users.
68. I have reread all of the passages identified. In my judgment, whether taken individually or collectively, or even with the other matters relied upon by the Defendant, they did not represent a proper or sufficient indication to the claimant of “significant issues” being raised, let alone issues which could become determinative in the appeal. Many of the representations were of a very general nature as might often be encountered in a planning appeal. Mr Kimblin accepted that it would hardly accord with the highly focussed nature

of modern public inquiries to expect the appellant to deal with each and every representation of that kind, particularly if the matter had been resolved in a statement of common ground agreed with the authority. That focussed approach acknowledges a need to apply finite public resources for planning inquires not only fairly but also efficiently and to avoid the appeal process becoming too protracted.

69. For example on speed, Mr. Kimblin relied upon representations made by Shiplake Parish Council in a letter dated 20 June. They merely stated:

> "Access arrangements, particularly pedestrian, are convoluted, inadequate and over engineered in order to provide an access to and across a busy and dangerous main road, arrangements which in our local view are unsafe."

That was a comment which was directed at all of the access arrangements, although slightly more emphasis was laid upon pedestrian access. Even so, the representation was not very clear. At one and the same time the arrangements were said to be both inadequate and over-engineered.

70. Secondly, the Parish Council also said:

> "The development proposes to link to the village via a footpath along the western edge of the road with a road crossing point near the bend of the war memorial and across A4155/Woodland Road/Station Road junction. This walk would be unpleasant and difficult to negotiate, particularly at the busy three-way junction."

It was not suggested that the location or design of the crossing would be unsafe and so should be rejected. The Parish Council also made a generalised point that although the A4155 has a 30 mph per hour speed limit along the site boundary yet it exhibits the rural character of a road with a national speed limit of 60 mph. It is apparent from any fair reading of the letter that the thrust of the criticism was directed to the site access rather than specifically to the pedestrian crossing.

71. Ms Katrina Verran expressed concerns about the level of speed at the War Memorial corner itself. She also asserted that visibility at that location was bad. But nothing

specific was said about the proposed design and its visibility envelope which had been accepted by the Highway Authority. It was of particular importance to the outcome of the appeal that the scope to improve the arrangement pursuant to a condition on a planning permission was not challenged or questioned.

72. Although some letters referred in general terms to accident history, none gave any detail of an accident relevant to assessing the safety of the proposed crossing or its design. Moreover, the Inspector did not ask for information on the details of previous accidents for that purpose, nor did he rely upon that aspect in his Decision Letter.

73. With regard to road layout and hazards the most specific comments in third party representations were those made by the Fairthornes to which I have already referred. Others were more generalised.

74. In any event the representations made by members of the public to which the court was referred have to be set alongside the statement of common ground and the failure by the Inspector to pursue the particular matters which found their way into his Decision Letter with the parties during the course of the inquiry. He did not even question the agreed position that the location and design of the pedestrian crossing could be controlled by a Grampion-type condition. None of the written representations raised any issue as to the appropriateness of such a condition.

75. These and related issues were not raised by the Inspector or by any other party during the inquiry with the claimant or the Highway Authority. I have therefore reached the firm conclusion that ground 1 must succeed on the basis of procedural unfairness. I am satisfied that it cannot be said that the claimant ought reasonably to have been aware from the material available at the time of the enquiry and/or from what took place at the inquiry that the specific points relating to the pedestrian crossing, upon which the

Inspector dismissed the appeal, should be addressed, notwithstanding the statement of common ground.

76. It is agreed by the Secretary of State that if ground 1 succeeds then the decision must be quashed.

Ground 2

77. I have already recounted the agreement between the two authorities and the claimant that the issue as to whether the visibility envelope should be adjusted which was a matter which could be controlled by condition. In paragraph 32 of his Decision Letter the Inspector appears to have taken a different view. There is no dispute that this was not an issue which was raised by him at all during the course of the inquiry.

78. Going back to the representations made by third parties it is plain to me that they did not seek to question the agreement of the planning authorities with the Claimant that the location and design of the crossing could adequately and properly be controlled as a detailed matter pursuant to a condition on the permission by adjusting the crossing point and/or the visibility splays within the land available.

79. Applying the principles in Hopkins and the other authorities to which I have referred, I am satisfied that in this respect the Inspector failed to comply with the appropriate standards of procedural fairness. For these reasons ground 2 also succeeds and the decision must be quashed in any event on this ground.

Conclusion

80. Grounds 1 and 2 succeed and the decision must be quashed.

81. MR MILLS: My Lord, I am grateful. As you will be aware I am not

Mr Lockhart-Mummery.

82. MR JUSTICE HOLGATE: I noticed the difference.
83. MR MILLS: I have an application for the claimant's costs but I have provided a schedule to my learned friend. I hope a schedule has been provided to you.
84. MR JUSTICE HOLGATE: Yes. Has there been any discussion about costs at all?
85. MR KIMBLIN: My Lord, the Government Legal Department has been in touch with the claimant's solicitor and having regard to the number of issues which there are between the parties on the costs, my preferred course is to send this for detailed assessment. There is quite a lot to be discussed. That is my position, my learned friend has other instructions.
86. MR JUSTICE HOLGATE: The normal practice would be to assess costs today.
87. MR KIMBLIN: It would.
88. MR JUSTICE HOLGATE: Are you in a position, presumably after the gap that we have had to deal with those issues?
89. MR KIMBLIN: I am in a position to make submissions but they will be fairly lengthy.
90. MR JUSTICE HOLGATE: I have been warned. Is it possible to narrow down the issues at all? To put it another way, having worked through your submissions on costs, if they were all to be accepted what would happen to the figure?
91. MR KIMBLIN: It would reduce from £64,000.
92. MR JUSTICE HOLGATE: Including VAT.
93. MR KIMBLIN: Including VAT. To around £20,000 plus VAT.
94. MR JUSTICE HOLGATE: Around 24. 64 to 24, a reduction of £40,000. Mr Mills would you like to proceed with an assessment today rather than a detailed assessment?
95. MR MILLS: My Lord, yes, it was a hearing of one day etc.

96. MR JUSTICE HOLGATE: Also the costs of the detailed assessment and the delay involved. Let me find the ... was there a schedule from the Secretary of State by the way?

97. MR KIMBLIN: There is.

98. MR JUSTICE HOLGATE: What was the figure in the Secretary of State's schedule.

99. MR KIMBLIN: Rather different. Less than 10.

100. MR JUSTICE HOLGATE: Including the supplemental bundle. Okay. Right.

101. Well, let us hear the points then. Let me make sure I am working from the right schedule. There was another schedule provided in August.

102. MR KIMBLIN: That is right.

103. MR MILLS: I have multiple copies my Lord if I can assist matters by handing one up.

104. MR JUSTICE HOLGATE: I think you have that.

105. MR KIMBLIN: I do. It is one which is amended in manuscript to include today.

106. MR JUSTICE HOLGATE: Where is the manuscript change please?

107. MR MILLS: At page 4 of 5.

108. MR KIMBLIN: The copy I have there is an amendment to include under counsel's fees the costs of the claimant attending today.

109. MR JUSTICE HOLGATE: I have ... no ... I am afraid I do not see any amendment at all. Not in this copy. That is as was sent to the court on 10th September. If I am looking at the wrong page I apologise. This document I have. What I was referring to was the recent Precedent H schedule.

110. MR MILLS: My Lord, that document is not to be relied on, it is the one that you are holding now.

111. MR JUSTICE HOLGATE: I appreciate it has been overtaken by a later

document. Do you want to make any points about the differences between President H and what we now have?

112. MR KIMBLIN: My learned friend's solicitor explained in an e-mail.

113. MR JUSTICE HOLGATE: The answer is "no".

114. MR KIMBLIN: The answer is "no."

115. MR JUSTICE HOLGATE: Good.

116. MR KIMBLIN: I am happy to carry on.

117. MR JUSTICE HOLGATE: Sorry to waste your time.

118. MR KIMBLIN: My Lord, the first two points go to time spent and the rate. Dealing with rate first of all, my Lord will see that the claimant's solicitors costs are charged at £450 per an hour. The first point is that it was unnecessary for all of that work to be done by a solicitor within that band and grade.

119. MR JUSTICE HOLGATE: Forgive me for a second. No issue about the rate as such for the work that was properly done by that person?

120. MR KIMBLIN: That is correct.

121. MR JUSTICE HOLGATE: But the issue is how much work at that rate by that person.

122. MR KIMBLIN: So...

123. MR JUSTICE HOLGATE: Okay.

124. MR KIMBLIN: It is entitled to blame us a bit.

125. MR JUSTICE HOLGATE: Which items does this affect?

126. MR KIMBLIN: All of them, so far as the time for the claimant's solicitor is concerned. Everything is charged at that rate.

127. MR JUSTICE HOLGATE: On the schedule that takes - I am on the third page

now Mr Kimblin - does that take us to inspections where the figure I think is brought together, £8,325. Before we get to attendance at hearing.

128. MR KIMBLIN: The answer to that is "no", but there is no separate subheading so far as the attendances and inspections are concerned. The sum of £23,377 which is the subtotal, comprises two elements being the various attendances plus the work done on documents which my Lord sees at £3,825.

129. MR JUSTICE HOLGATE: Forgive me, I understand you are talking about £23,377.50 which is presumably a subtotal of everything before that line.

130. MR KIMBLIN: Yes.

131. MR JUSTICE HOLGATE: Before that line there is a section headed "attendance at hearings", can we put that to one side, because I imagine you would not say it was unreasonable for the gentleman concerned to attend the hearing.

132. MR KIMBLIN: I do not.

133. MR JUSTICE HOLGATE: That is why I was trying to simplify things. Your point basically relates to items above that.

134. MR KIMBLIN: Yes.

135. MR JUSTICE HOLGATE: That would be more than £8,325 or would it?

136. MR KIMBLIN: It would be more because £8,325, if my Lord turns the page, my Lord, can see where that comes from, there is a schedule of work done on documents.

137. MR JUSTICE HOLGATE: Yes.

138. MR KIMBLIN: Equally if I can simplify things and make it as broad brush as I can for a summary assessment. So far as the attendances and the work on documents are concerned, what I would submit is that an element of that work, a significant element of that work could have been done by a fee earner in band D at somewhere around £140 an

hour. If we were to turn up the relevant rates to those.

139. MR JUSTICE HOLGATE: Let me write this down: submit that significant part of 8325 - yes?

140. MR KIMBLIN: My Lord, yes.

141. MR JUSTICE HOLGATE: Could have been done by band D. At what rate?

142. MR KIMBLIN: £140.

143. MR JUSTICE HOLGATE: The number of hours is not being questioned it is how they were...

144. MR KIMBLIN: I question both the number of hours and the rate.

145. MR JUSTICE HOLGATE: So far as the figure of £8,325 is concerned is anything wrong with the number of hours?

146. MR KIMBLIN: My Lord, yes, if you turn to the schedule.

147. MR JUSTICE HOLGATE: I have it.

148. MR KIMBLIN: My Lord, can I make this overarching point which might assist in getting us through quicker. £450 I have accepted. I have made the band D point. If one blends those rates at about two-thirds/one-third, so a third of the time spent by the senior, one comes to a blended rate of about £280 which is the way in which I have approached it.

149. MR JUSTICE HOLGATE: That is another way of saying that is a third of time incurred even assuming the time is acceptable, it should have been done by a more junior solicitor.

150. MR KIMBLIN: Two-thirds should have be done by a more junior solicitor.

151. MR JUSTICE HOLGATE: If I do my maths correctly. What is band D by the way?

152. MR KIMBLIN: Band D is £140 an hour.

153. MR JUSTICE HOLGATE: What sort of person is band D. The White Book indicates such a lawyer as shown on the schedule at the bottom of the... Trainee solicitors. You have to be joking, have you not? Instructions to counsel, considering witness statements, the drawing up of the witness statements, you would leave that to a trainee solicitor?

154. MR KIMBLIN: The making up of bundles.

155. MR JUSTICE HOLGATE: That is different. Where is that on the £8,325 schedule? Reviewing the Inspector's witness statement, the 500 page bundle. I would not leave that to a trainee.

156. MR KIMBLIN: But there are two routes through this, either one takes --

157. MR JUSTICE HOLGATE: One route through this is to make submissions which are realistic. So where do we apply the trainee to. The bundle. Tell me which items was -- forgive me you are suggesting that two-thirds of the work should be done by a trainee. It should be possible to see very quickly where the two-thirds are, should it not?

158. MR KIMBLIN: Well, can I approach it in this way. This, in my submission, is the sort of case where it is necessary to deal with matters by detailed assessment but I have to deal with it by way of overview to deal with summary assessment. The reality what would be appropriate is to consider which appropriate grade each element work falls into but that will take us all afternoon and I do not propose to do that. It may well be and I entirely accept that there are elements of work which are appropriate for solicitors in band B or C at rates such as £220 or £300. But to go through that in detail.

159. MR JUSTICE HOLGATE: Forgive me. This is not satisfactory because there have been several days for this to be considered. Often issues of this kind can be agreed

between parties who remember their duty to co-operate with the court, and what you are trying to persuade me to do is order a detailed assessment when the applicant does not want it, it will delay costs for the applicant and it will cause more costs to be incurred. Now, you need to persuade me that the normal process is not appropriate and so far I am afraid you are not succeeding. I am very happy to sit here and deal with it.

160. MR KIMBLIN: Very well.

161. MR JUSTICE HOLGATE: Let us deal with it realistically and helpfully and so far I am not being helped at all. I have looked - forgive me for putting it this way - I looked at this schedule leading to £8,325 and I can see very little there that ought to be dealt with by a trainee, if anything. So, where do we apply the trainee to?

162. MR KIMBLIN: If I could deal first of all. Can I assist my Lord in this way. My Lord does not want to proceed with this in respect of band D approach - I abandon that.

163. MR JUSTICE HOLGATE: It is up to you what to put forward. I expect if you make a submission to me you will not make a submission unless you can back it up.

164. MR KIMBLIN: My Lord, certainly in respect of the documents that is very easily backed up by looking at the nature of the work done on the schedule of documents.

165. MR JUSTICE HOLGATE: This is not a horse trading session. I expect any submissions to be made, with all due respect, to be made on the basis they are properly to be made, otherwise time should not be taken up. So you are abandoning band D altogether. What do we look at instead?

166. MR KIMBLIN: C. Other solicitors and legal executives, fee earners of equivalent experience.

167. MR JUSTICE HOLGATE: But not somebody with over 4 years' post qualification experience or at least ... what do you get for band C.

168. MR KIMBLIN: Band C in the city of London, which this is around £230.

169. MR JUSTICE HOLGATE: Right. What items do you suggest that should be applied to?

170. MR KIMBLIN: So far as the schedule of documents is concerned there are three of them. Firstly, in respect of considering witness statements. Secondly, the fourth item, reviewing and tabbing Inspector's exhibit, and thirdly, the eighth item, the drafting statement of costs.

171. MR JUSTICE HOLGATE: Reviewing and tabbing Inspector's exhibits so that is £2,250, £900 and £1,350 - yes?

172. MR KIMBLIN: My Lord, yes?

173. MR JUSTICE HOLGATE: I make that £4,500. What would that then reduce to?

174. MR KIMBLIN: Before we come to that fact may I deal with time, since we are on the issue. Deal with time on this issue. I say that in respect of one instructions to counsel 5 hours is more than is necessary in a case such as this. I contend for half of that, 2.5 hours.

175. MR JUSTICE HOLGATE: I remember this when I see Treasury Solicitor bills. Next?

176. MR KIMBLIN: Turning then to considering the particulars of claim, particulars claim settled by --

177. MR JUSTICE HOLGATE: Is that in the same schedule. Yes.

178. MR KIMBLIN: Settled by leading counsel, unnecessary time to be spent checking Mr Lockhart-Mummery's work. I do not accept that at all.

179. MR JUSTICE HOLGATE: Delete 5.

180. That was item 1, take one-half. Right.

181. MR KIMBLIN: As to 8, which we have touched on already, 3 hours for a statement of costs is we say too high, an hour-and-a-half should be sufficient.

182. Then, my Lord, if we turn -- may I turn my back a moment please?

183. MR JUSTICE HOLGATE: Yes.

184. MR KIMBLIN: Returning to the sort of the question of grade D. I am instructed that that is a task often undertaken by somebody at grade D or thereabouts.

185. MR JUSTICE HOLGATE: Sorry, what sort of task?

186. MR KIMBLIN: Drafting of a statement of costs.

187. MR JUSTICE HOLGATE: I thought you had abandoned grade D a moment ago. You are going back on that. As I say this is not a negotiation.

188. MR KIMBLIN: It does not mean --

189. MR JUSTICE HOLGATE: These are supposed to be well considered submissions.

190. MR KIMBLIN: Turning if I may to the attendances, if I may touch upon first of all the add time spent.

191. MR JUSTICE HOLGATE: I am sorry not to be keeping up with everyone, I am trying to see how the £23,377 is made up and obviously it includes the £8,325 which you and I have looked at together. It would also include the attendance at the hearing. You have been good enough to say no issues are taken about those numbers which do not get one to £23,000.

192. MR KIMBLIN: As far I am unable to find an additional subtotal to add to the documents.

193. MR JUSTICE HOLGATE: Before we go any further, I must ask Mr Mills to explain that to me. If I look at the first claim we have £675, we are up to £3,000, £7,075

and £10,7 ... get to 19 before I add on. I think I see how it works. Yes, I get to about £19,000 by the time I get to £8,325 and then -- You happy with that that it adds up?

194. MR KIMBLIN: Yes.

195. MR JUSTICE HOLGATE: I am sorry. I interrupted you.

196. MR KIMBLIN: Not at all. I was going to deal with it first of all by reference to time in respect of attendances because that has, in my submission, the greatest impact if I succeed in those submissions. My Lord, if the time which is spent in respect of letters and telephone calls is summed we get to 18.6 hours.

197. MR JUSTICE HOLGATE: Is that all the hours for all the boxes on the first page, all the boxes on the second page.

198. MR KIMBLIN: Yes.

199. MR JUSTICE HOLGATE: Yes. Right 18 hours.

200. MR KIMBLIN: It is the time before we get to attendance at hearing.

201. MR JUSTICE HOLGATE: Thank you.

202. MR KIMBLIN: To deal with my learned friend's question. That is about two-and-half days of such activity.

203. MR JUSTICE HOLGATE: For some people. Depending on how you measure a working day but never mind. Right, so what do you say?

204. MR KIMBLIN: For a case of this sort, which I submit to be in the context of the work done on documents to be higher.

205. MR JUSTICE HOLGATE: What would you suggest please?

206. MR KIMBLIN: I suggest in that respect 10 hours.

207. MR JUSTICE HOLGATE: Thank you. That covers attending on the client, attending on opponents, personal attendances on others which I suppose could be

witnesses and counsel may be.

208. MR KIMBLIN: I just heard from behind me.

209. MR JUSTICE HOLGATE: So did I. Witnesses and counsel. You say 10 hours. Any other point please on that?

210. MR KIMBLIN: That is all I want to say in respect of time. We then come to the question of what the appropriate rates are, and the simple submission is again one third of that time, so save for in round terms, 3 hours, £450 an hour and taking the band C point, the balance of 7 hours at £230 an hour.

211. MR JUSTICE HOLGATE: Thank you. That is very clear.

212. MR KIMBLIN: We are advancing in that respect. That covers the time and rate in respect of attendances. So far as attendance at the hearing is concerned we have dealt with so far as the solicitor is concerned. But on the third page of ... the fourth page of the schedule, there is a heading "other expenses" which includes three professional witnesses so described, Les Durrant, Brett Farmery and David Cooper at £5,000, £3,000 and £1,200. I am unaware of the rates at which they are charging to reach those sums. But certainly £5,300 and £3,200 may indicate a fairly significant amount of time.

213. MR JUSTICE HOLGATE: They seem to have gone to a consultation and presumably also worked on the witness statement. It seems to be two components. What would you like to say please?

214. MR MILLS: My Lord, having regard to the fact that work will have been done on those documents by the claimant's solicitor and no doubt contributions within the advice from Mr Lockhart-Mummery and without all of those matters those I submit are high, having regard to the work involved. As I say I am somewhat hampered at not knowing what the rates are.

215. MR JUSTICE HOLGATE: That is a question that could have been asked over the last few days. Could you help please?

216. MR MILLS: My Lord, if I could assist. I am no longer pursuing costs for Mr Cooper, so he can go. My Lord, you may recall in the way I cannot Mr Farmery attending the hearing last week. I am instructed that he provided some assistance.

217. MR JUSTICE HOLGATE: He gave me one dimension. I would not over egg it.

218. MR MILLS: Apologies.

219. MR JUSTICE HOLGATE: He gave a limited amount of assistance. You do not pursue Mr Cooper's costs rather. But I think you are going to ask for help, I do not know if the question has been raised before as to what the rates are for these two gentlemen.

220. MR MILLS: I need to turn my back. I am afraid I am not able to assist.

221. MR JUSTICE HOLGATE: Indeed how many hours are involved. Have they given a sort of account. We can come back to that if there are any other points that can be looked up. I do not know. Has this been raised over the last few days this particular point?

222. MR MILLS: I have not heard on the other side -- no I have not heard from the other side.

223. MR KIMBLIN: Just by way of background to assist my Lord, from our side, we had understood as of the end of last week that detailed assessment was an agreed approach.

224. MR JUSTICE HOLGATE: I did not know that before.

225. MR KIMBLIN: Perhaps that fault lies with us not making that quite clear.

226. MR JUSTICE HOLGATE: At the beginning. They are not agreeing now. Is that right, did you agree a detailed assessment at one stage?

227. MR MILLS: I am not aware that has ever been agreed my Lord.

228. MR KIMBLIN: Well, to be quite clear it had been understood on our side, there was an agreement as to detailed assessment.

229. MR JUSTICE HOLGATE: Is that understanding based on something said by the other side?

230. MR KIMBLIN: Based on exchange of emails between somebody who is not behind me at the moment and I cannot go further on it.

231. MR JUSTICE HOLGATE: And?

232. MR KIMBLIN: The claimant's solicitor. That was the basis on which we were preparing and that accounts for some of my Lord's adverse remarks. I had this for 20 minutes this afternoon.

233. MR JUSTICE HOLGATE: You told me you were ready to go. You did not explain the difficulty at the outset. You are not exactly putting the points in the right order with respect.

234. MR KIMBLIN: There we are.

235. MR JUSTICE HOLGATE: If you told me that at the beginning I would have focussed on that. I got the clear understanding from you that that you were able to advance these points but it would take some time.

236. MR KIMBLIN: I doubled the mistake. So far as we are dealing with the issue of --

237. MR JUSTICE HOLGATE: I also had the impression from you there had been discussion between the parties about costs. I had the impression that some of these issues had been ventilated already, that is why I asked the question. Have they have not been ventilated, any of the points?

238. MR MILLS: My Lord, no.

239. MR JUSTICE HOLGATE: You still want them to be assessed now.

240. MR MILLS: It is the standard course of events.

241. MR JUSTICE HOLGATE: It does not mean you have to follow the standard course. Do you still want to have them assessed now and do the best we can in fairness? When did it became clear they wanted the costs to be assessed today?

242. MR KIMBLIN: Became clear to me the middle of today.

243. MR JUSTICE HOLGATE: Are you able to help on that Mr Mills?

244. MR KIMBLIN: What I would like to say in respect of Mr Mills in particular through his courtesy that I understood that, so it is to his credit.

245. MR JUSTICE HOLGATE: I am sure. Mr Mills are you aware as to whether the claimant made her position clear about costs before today?

246. MR MILLS: I am told from behind there was no indication that detailed assessment would be the course which was agreed. And as such, the basis which I was proceeding was that this it would be summary assessment.

247. MR JUSTICE HOLGATE: Can you show me the e-mail?

248. MR KIMBLIN: No, I cannot.

249. MR JUSTICE HOLGATE: Thank you. Sorry we were in the middle of looking.

250. MR KIMBLIN: In the middle of professional witnesses. The simple submission is that approaching £8,500 of expert time is a substantial sum in the context of the issues which was necessary to deal with it, which was primarily to do two things: one was to state what happened at the inquiry and secondly to exhibit the statement of common ground.

251. I do not have a point of reference other than to make -- I do not have a point of

reference to what the appropriate sum might be but I do not concede that sum. So far as I am able to make any submission it is the witness statement of Les Durrant which seems particularly out of scale, having regard to what he had to do. He was not the highways witness, he was tasked only with the recounting of what happened at the --

252. MR JUSTICE HOLGATE: Did Mr Durrant attend last week; I do not remember?

253. MR MILLS: No he did not.

254. MR JUSTICE HOLGATE: I have the point.

255. MR KIMBLIN: I am grateful. Which brings me to counsel's fees which come in three parts. Mr Mills I accept.

256. MR JUSTICE HOLGATE: Which figure is that?

257. MR KIMBLIN: In manuscript I have it as £750.

258. MR JUSTICE HOLGATE: That is accepted. Thank you for that.

259. MR KIMBLIN: So far as fee for advice is concerned, I invite my Lord to combine that with the fee for the hearing because taking it in overview £18,000 for preparing and appearing in a case which was broadly one issue, limited number of authorities.

260. MR JUSTICE HOLGATE: Would you suggest 15K to cover everything; is that your point, so far as Mr Lockhart-Mummery is concerned?

261. MR KIMBLIN: My submission was to accept the £3,000 for the advice, and having just regard to the sorts of numbers seen elsewhere for senior practitioners doing work of this sort, one typically sees numbers of around £8,000. My Lord, will have more experience.

262. MR JUSTICE HOLGATE: It is a distant memory. That would cover the brief fee plus the skeleton; is that right?

263. MR KIMBLIN: My Lord, yes and the reason I make that submission is because the skeleton is essentially the same as the particulars, which must fall under the heading "fee for advice conference and documents £3,000".

264. MR JUSTICE HOLGATE: It would also include considering the 500 page bundle.

265. MR KIMBLIN: Yes.

266. MR JUSTICE HOLGATE: And the supplemental skeleton?

267. MR KIMBLIN: Yes.

268. MR JUSTICE HOLGATE: Okay. Thank you.

269. Now where have you got to?

270. MR KIMBLIN: Those are my points.

271. MR JUSTICE HOLGATE: You have made them very clearly and helpfully eventually.

272. Shall we start, as it were, from the bottom up, counsel's fees. Your £750 is not disputed. There is a challenge to a total of £18,000 for Mr Lockhart-Mummery ... well, not to the £3,000 to cover the initial con, where he had to establish in fact what had happened but the challenges to the £15,000, which should be reduced to £8,000. But I remind myself that the £15,000 relates to a very senior Silk, and it is not suggested he should not have been employed in this case, covers two skeletons plus also considering the 500 page bundle. In the circumstances I am not going to reduce any of these fees.

273. MR MILLS: Very well my Lord, I shall not argue those.

274. MR JUSTICE HOLGATE: It was a one day case but there was a lot more to it than that would suggest at first sight, not least because of the late service of evidence by the Secretary of State after the main skeleton had gone in. So Mr Lockhart-Mummery

has had to do extra work without any apparent adjustment to the fee. My recollection is that £15,000 possibly appeared on the appendix H document.

275. MR MILLS: That is also my recollection.

276. MR JUSTICE HOLGATE: I stand to be corrected on that if I am wrong. On that understanding, if that understanding be right, he has not charged any more despite the additional work that has been necessitated. In that case the fee is perfectly fair and I uphold it.

277. We now are left with the other items. Would it be convenient to start with, as we did, the £8,325 work done on documents?

278. MR MILLS: My Lord, yes. So there are two points, firstly, the amount of time and secondly, who does what. If I can take --

279. MR JUSTICE HOLGATE: Shall we deal with who does what first of all.

280. MR MILLS: Very well.

281. MR JUSTICE HOLGATE: Considering the witness statements.

282. MR MILLS: That essentially is the work on the witness statements, drafting involvement in the drafting two and fro on discussion.

283. MR JUSTICE HOLGATE: The choice is between band A and band C. My decision there is band A is appropriate. I cannot see any difference between that on the one hand, as opposed to there is no dispute over item 3 which is reviewing the inspector's witness statement, so logically I cannot see a difference. Reviewing and tabbing the Inspector's exhibits. There is no need to be concerned I think that No 2 should remain as band A - okay.

284. MR MILLS: Thank you my Lord, I was checking who had drafted the witness statement.

285. MR JUSTICE HOLGATE: Let us not go further into that. On the other hand item 5 -- 4, reviewing and tabbing Inspector's exhibits. Could that perhaps be done by someone else?

286. MR MILLS: My Lord, this is evidence which the Secretary of State thought considered was important and put in at this late stage. My submission is that it deserves --

287. MR JUSTICE HOLGATE: It is two hours and I think I ought to be realistic and proportionate about this. If you employ somebody else a band C or B or whatever, they have to read into the case.

288. MR MILLS: There are elements of that.

289. MR JUSTICE HOLGATE: May be an appropriate way of looking at this is to be careful about the total time being charged so I am with you there. That stays at band A subject to time. Drafting bill of costs, why could not that be done by a band C?

290. MR MILLS: I am not going to...

291. MR JUSTICE HOLGATE: I think you should give way on that one.

292. MR MILLS: I am not going to push too hard on that.

293. MR JUSTICE HOLGATE: Number 8 will come down to C please. And then we look at the total time. It is said for a statement of costs this could have taken one-and-a-half hours instead of 3. Do you want to say anything about that?

294. MR MILLS: My Lord, nothing more than saying that there are clearly different elements which this case has involved will make the number of different boxes which are filled in to put it fairly simply.

295. MR JUSTICE HOLGATE: A lot of these costs are logged as you go through the case, are they not? I am going to reduce that to 2 hours.

296. MR MILLS: Very well my Lord.

297. MR JUSTICE HOLGATE: Then it is suggested that line 5 be deleted "considering and commenting" so that is 2 hours at band C for item 8 and then I think the two other items challenged. One is to delete number 5, commenting on the particulars of claim, considering them, once they have been drafted by leading counsel?

298. MR MILLS: My Lord, I do not accept that point. I am told from behind, very senior leading counsel though he is, Mr Lockhart-Mummery did accept a comment or comments which were made by my instructing solicitor. It is entirely appropriate to have an element of conversation with an experienced solicitor and leading counsel on such appeal.

299. MR JUSTICE HOLGATE: What about, before we leave that one, what about item 1, suggested the instructions should have taken two-and-half hours rather than 5?

300. MR MILLS: I am told it included instructions on conference as well, so not simply instructions for the hearing.

301. MR JUSTICE HOLGATE: I understood it to include the consultation, but there would not have been much additional by way of instructing for the hearing I imagine.

302. MR MILLS: Potentially not my Lord.

303. MR JUSTICE HOLGATE: I think that should be reduced to 3 hours on that basis I will not adjust item 1. I will take 1 and 5 together and reduce the 5 plus 1 to 4 overall. But that remains at band A please. So we have dealt with the schedule of work on documents, and then we come to attendances and everything before the work on documents, then we have the professional witnesses. It is said instead of 18 hours it should be 10 hours and then three should have been band A and seven band C. What would you like to say about that?

304. MR MILLS: My Lord, if I may briefly turn my back?

305. MR JUSTICE HOLGATE: Yes, of course.

306. MR MILLS: My Lord, my instructing solicitor of course attended the consultation, which is the matter to be counted in these figures. Regarding the largest figure in terms of time --

307. MR JUSTICE HOLGATE: As a matter of interest how long was the consultation - roughly?

308. MR MILLS: I am told it must have been a couple of hours.

309. MR JUSTICE HOLGATE: Understood.

310. MR MILLS: Letters out and e-mails and telephone. In a case, in attendance on others, my Lord, it is the second half of the second page that is where the lion's share of the same comes so a case of number of witnesses, those communication are necessary, turn from counsel, turn from witnesses, clerks etc.

311. MR JUSTICE HOLGATE: That item, personal attendances 4 hours, letters out 9.2, telephones 7.2. That item alone amounts to 20 hours I think, does it not?

312. MR MILLS: That is correct.

313. MR JUSTICE HOLGATE: Not the starting point of 18 which was given by Mr Kimblin.

314. MR MILLS: Of course, it must be remembered and looking at these figures as a whole, I believe they are in the attendance, that it would be the attendance as part of the other part, I am sure it will be pointed out if I am wrong. It is estimated a couple of hours or so were spent in response to the late service of evidence.

315. MR JUSTICE HOLGATE: The overall total is more like 24 hours than 18. So if I had cut it to 10 I would have been cutting it more than I realised.

316. MR MILLS: Cutting it very severely. I think it can be said that, of course the claimants are going to have the lion's share.

317. MR JUSTICE HOLGATE: This implies that all the bundles, everything has been done by a partner. Where are the bundles dealt with in the schedule of costs. Or were they free?

318. MR MILLS: I am told they have not been charged specifically.

319. MR JUSTICE HOLGATE: So we have got a total 24 hours. Do you want to say whether any of this work could have been done by a band C solicitor.

320. MR MILLS: No save, in so far as your Lordship identified there are economies to be had by having a sole fee earner on the case.

321. MR JUSTICE HOLGATE: The trouble with that argument is the greater the total number of hours the greater incentive to economise.

322. MR MILLS: An argument that can only be taken so far.

323. MR JUSTICE HOLGATE: The total, I am going to do this in a broad brush way as one does for summary assessment. The total is 24 hours. Taking into account the fact that apparently no charge had been made in relation to the bundles which certainly would not have attracted a category A rate, I am going to reduce the 24 hours to 20 and I think 13 of those hours should be at category A and 7 should be at level C.

324. That then deals with pages 1 and 2 of the schedule. The attendance at hearing is not disputed. We have dealt with the work on the documents. The only remaining items to be dealt with then are the professional witnesses. The primary point that is being made there against you is that it is rather surprising to see that Mr Durrant, who did not appear at the hearing, charging rather more than the primary witness relied upon to support the challenge, Mr Brett Farmery, and I see force in that.

325. MR MILLS: My Lord, I will turn my back. I do not want to have mislead the court. I said that there are no specific charges for the bundles. I am not saying they were necessarily free, what I dealt they have not been charged specifically on the...

326. MR JUSTICE HOLGATE: It is all swept up. Thank you. Then what about Mr Durrant and Mr Farmery?

327. MR MILLS: Thank you my Lord, if I may?

328. Mr Durrant he had conduct of the section 78 appeal so it was him who was dealing with collating of documentation arising from work to be done in that regard.

329. MR JUSTICE HOLGATE: Let us be clear about this. So far as the claimant's bundle is concerned it is basically the Decision Letter, it is the claim that is drafted by leading counsel with the aid also of the instructing solicitor. It is two witness statements which have been separately charged and the rest of it are documents which already existed. I do not think Mr Durrant had a great deal to do, as compared with Mr Farmery. This is primarily a highway issue. Do you want to say anything more about that?

330. Mr Durrant did of course provide a witness of his own. Shall we say, with all due respect of a more generalised nature.

331. MR MILLS: Very well, being realistic. I am willing to take a haircut.

332. MR JUSTICE HOLGATE: Very well put. Mr Farmery will stay at £3,198.10. Mr Durrant, I am afraid has to be reduced because I do not see a justification put forward here. So, absent a proper justification being put forward, which I think could have been anticipated, I think that figure must come down. He attended the con. I think it comes down to £1500. All those figures are net of VAT.

333. So shall we recap together, unless anybody wants to say something more. Then perhaps I may leave you gentlemen to work it out. Then could you let the court know an

agreed figure to go in the order please. On personal attendances on pages 1 and 2, the total figure is 20 hours split between 13 hours at category A and 7 hours at category C. Then turning to work on documents the schedule which produces a figure of £8,325, I have altered item A, the drafting of the statement of costs to be 2 hours at I think I meant to say category C, that is what was being suggested. Then the other aspect, I think was 1 and 5 taken together, 6 hours reduced to 4 but all at category A. I think those are the only adjustments I have made on that schedule. Have I missed anything?

334. MR KIMBLIN: My Lord, no.

335. MR JUSTICE HOLGATE: Thank you for your help. As regards experts, Mr Cooper is deleted or rather his cost is deleted. Mr Brett Farmery stays as is at £3,198.10. Mr Les Durrant is reduced from the figure here down to £1500. I think you are entitled to add on the fares you have claimed at £84. The only other item I think was discussed were the fees for counsel and I have upheld all those fees because of the additional work which was necessary here. Have I missed anything else out?

336. MR MILLS: Not that I am aware of my Lord.

337. My Lord, thank you.

338. MR JUSTICE HOLGATE: Thank you. Mr Kimblin.

339. MR KIMBLIN: I have done the sums and I will agree those I am sure after the court has risen.

340. MR JUSTICE HOLGATE: Can it be done this afternoon by any chance?

341. MR KIMBLIN: Yes.

342. MR JUSTICE HOLGATE: I am sorry to trespass more on your time. It is probably better done now than later on, whilst everybody is here. If any issue arises, I am sure you can contact --

343. MR KIMBLIN: I am sure it will be agreed and find its way into order. We will draft an order in any event and we will send that across to your clerk this evening.

344. MR JUSTICE HOLGATE: You have the email address of course. I am grateful.

345. MR KIMBLIN: If I may trouble my Lord with one further supplementary matter which I can deal with very, very quickly, which is simply to deal with the question of permission to appeal. On three points. The first and under the heading "main issue". This is a case which is neither appeal case or Castleford Homes case nor a Hopkins case on the facts in this instance, a main issue case with a statement of common ground and I would invite my Lord to grant permission to appeal on the basis that there is a reasonable prospect that another court would give more weight to the fact of highway safety being a main issue than my Lord has in my Lord's judgment. That is ground 1.

346. Secondly, as to third parties, my Lord, noted in his judgment that the role of third parties in this decision, my Lord's judgment is important and my Lord construed the contributions in the representations made in, if I could put it in this way, a narrow sense and I invite my Lord to conclude another court might take a broader approach to construing what is said by third parties matters as to matters such as highway safety, and that being a critical element of this decision may lead to a different outcome. Thirdly, under the heading "Principle 5" from Hopkins, I would invite my Lord to grant permission to appeal on the basis that principle 5 as clearly stated in Hopkins leads to a different outcome, or at least there is a realistic prospect of another court might say so, having regard to the Inspector not saying to the main parties that they do not need to deal with third party issues.

347. My Lord, lastly, not a separate ground but a separate submission as to the broader point of importance, which this matter raises, which is as to the extent of the duty upon

an Inspector where participants in an inquiry, namely third parties have raised the issue but an appellant has not called evidence in that respect. In my submission, that is of some broader interest and importance for the future conduct of inquiries which would benefit from the attention of the Court of Appeal so that the Secretary of State and his Inspectors may properly understand what the duty is in those particular circumstances.

348. My Lord, those are my submissions.

349. MR JUSTICE HOLGATE: Thank you for that. The third aspect principle 5 from Hopkins, that is the principle which uses the word "issue".

350. MR KIMBLIN: Yes, yes. We debated significance.

351. MR JUSTICE HOLGATE: It is Beatson LJ, with whom Christopher Clarke LJ agrees, who uses the phrase "significant issue", the live issue. I take it there is no disagreement so far as the Secretary of State is concerned that what one is really talking about is "significant issue".

352. MR KIMBLIN: Correct.

353. MR JUSTICE HOLGATE: Really that third point overlaps with the second one and how one approaches the representations made by members of the public.

354. MR KIMBLIN: My Lord, yes, it is in the context of the particular importance of the views of local people in the context of the Secretary of State's policies and indeed what is now the development plan.

355. MR JUSTICE HOLGATE: Do you want to say anything Mr Mills?

356. MR MILLS: You are aware I was not at the hearing but having taken a note of your Lordship's judgment my submission would be that your Lordship is applying the established and well-known principles to a particular factual scenario in front of your Lordship in a manner which cannot and need not properly trouble the Court of Appeal.

This was a situation where there was a clear demonstration of procedural unfairness as your Lordship has found. I am not going to trouble your Lordship further unless...

357. MR JUSTICE HOLGATE: Anything more Mr Kimblin?

358. MR KIMBLIN: I am grateful, I have had my go.

359. MR JUSTICE HOLGATE: I am not going to grant permission to appeal. My reasons briefly are as follows. I accept Mr Mills' submission that the principles for procedural fairness in this type of situation are well established, not only by the Court of Appeal but also a number of decisions of the High Court and I note it has not been suggested in the application for permission to appeal that the Court misdirected itself as to the principles to be applied. Rather it is suggested that the court has misapplied the principles to the facts of this case. In that context, I also note the clear statement of the Court of Appeal in Hopkins and indeed in my other authorities, that issues of procedural unfairness are highly fact sensitive.

360. Mr Kimblin, on behalf of the Secretary of State, advances three possible grounds of appeal, or areas of appeal but he rightly accepts that the third one which is said to be based on principle 5 in paragraph 62 of Hopkins is really a restatement of his second point and he also very fairly and properly accepts that in referring to an issue which a party ought to address one is talking of a "significant issue".

361. Therefore his application focuses on two matters only. The first is that an appellate court might give more weight, as he puts it, to highway safety as a main issue. In my judgment, that has no realistic prospect of success because these matters have to be looked at in the context of what happened before and at the inquiry overall, a matter which I have been at some pains to explain in my judgment. When the matter is looked at in the context of the statement of common ground and the way in which the Inspector

went against that in his decision without raising those matters with the parties, merely to say that highway safety in general terms was a main issue does not, in my judgment, give rise to a realistic prospect of success in the Court of Appeal.

362. The second aspect concerns the way in which the third party representations have been construed by the court. It is said that they have been construed in a narrow sense. I hope it will be understood that my understanding of those representations is set very much in the context of the material overall before the court which would have included the statement of common ground and also the behaviour of the Inspector in this case in not pursuing matters at the inquiry. I do not wish to elaborate further. I am left with the impression, I am bound to say, that this is the sort of case where in other circumstances the Secretary of State might have considered submitting to judgment.

363. For those reasons I do not grant permission to appeal. But I should add this. Despite Mr Kimblin's efforts I do not see how this particular appeal, with its particular set of facts, raises any broader question of principle so that the court should grant permission to appeal, even without a realistic prospect of success.